IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-851

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as THE ONEIDA NATION OF NEW YORK, also known as THE ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC., *Petitioners*,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK, *Respondents*.

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., NATIVE AMERICAN RIGHTS FUND, THE NAVAJO TRIBE, THE LAGUNA PUEBLO, THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND THE SENECA NATION, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.

ARTHUR LAZARUS, JR.
FRANCIS J. O'TOOLE
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
Attorneys for Amici Curiae Association on American Indian Affairs, Inc., The Navajo Tribe, The Laguna Pueblo, The Salt River Pima-Maricopa Indian Community, and The Seneca Nation

L. GRAEME BELL, III
1712 N Street, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae Native American Rights Fund

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-851

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as THE ONEIDA NATION OF NEW YORK, also known as THE ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC., *Petitioners,*

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK, *Respondents.*

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., NATIVE AMERICAN RIGHTS FUND, THE NAVAJO TRIBE, THE LAGUNA PUEBLO, THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND THE SENECA NATION, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.

I. INTEREST OF AMICI CURIAE

The parties have consented, by written stipulations, to the filing of this brief. The stipulations have been filed with the Clerk of the Court.

The Association on American Indian Affairs (the "Association") is a non-profit membership corporation, organized under the laws of the State of New York for the purpose of protecting the rights and

improving the welfare of American Indians. The largest Indian-interest organization in the country, the Association's membership of some 50,000 is made up of both Indians and non-Indians, and is nationwide in scope. Over the years, the Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of amicus curiae briefs with this Court in *Puyallup Tribe v. Department of Game of the State of Washington,* 391 U.S. 392 (1968), in *Warren Trading Post Co. v. Arizona State Tax Comm.,* 380 U.S. 685 (1965), and most recently in *Affiliated Ute Citizens of the State of Utah, et al. v. United States, et al.,* 406 U.S. 128 (1972); *Agua Caliente Band of Mission Indians, et al. v. County of Riverside,* 405 U.S. 1033 (1972); *Mescalero Apache Tribe v. Jones, et al.,* —— U.S. ——, 36 L. Ed. 2d 114 (1973); and *United States v. States of Nevada and California,* No. 59 Original, October Term, 1972.

The Native American Rights Fund (the "Fund") is a private non-profit corporation organized for the purpose of protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance to Indians. Because of the Fund's expertise in Indian law, the Fund also provides counsel to legal services programs on Indian legal matters under a contract with the Office of Economic Opportunity. The Fund has participated as amicus curiae in numerous cases before this Court.

The Navajo Tribe, the Laguna Pueblo and the Salt River Pima-Maricopa Indian Community are federally recognized tribes of American Indians which exercise jurisdiction over, and are the beneficial owners of,

reservations held in trust by the United States. The Seneca Nation, also a federally recognized tribe, holds title to its three reservations in the State of New York pursuant to federal treaty and statute, and subject to a restriction upon alienation. The Navajo Tribe, with a population in excess of 120,000, is the largest Indian tribe in the country.

This case presents a threshold question of great and continuing concern to amici curiae and to Indians generally—the question of whether an Indian tribe may seek redress in the federal courts for the alleged deprivation by a state, in violation of a federal law, of property rights guaranteed to the tribe by treaties with the federal government. The question is one of particular concern to amici curiae and Indian tribes generally where, as in this case, the Attorney General has declined, on grounds of conflict of interest,[1] to provide a tribe with representation for the purpose of asserting and vindicating its rights.

II. ARGUMENT

A. Introduction

The Oneida Indian Nations of New York and Wisconsin are seeking redress in this case for loss of possession of some of the lands guaranteed to them by a number of treaties with the United States.[2] This loss resulted from actions of the defendants' predecessor in interest, the State of New York, which allegedly

[1] The conflict of interest apparently was based in this case on the fact that the Oneidas presently are prosecuting a claim against the United States before the Indian Claims Commission pursuant to the Act of August 13, 1946, 60 Stat. 1050, 25 U.S.C. § 70a, *et seq.*

[2] *See* Treaty of November 11, 1794, 7 Stat. 44; Treaty of October 22, 1794, 7 Stat. 47; Treaty of January 9, 1789, 7 Stat. 33; Treaty of October 22, 1784, 7 Stat. 15.

violated the Indian Non-Intercourse Act of July 22, 1790, 1 Stat. 138, *as amended* 25 U.S.C. § 177 (1964).[3] In short, the petitioners' right of possession and violation of that right asserted in this case are founded upon federal treaties and a federal statute.

Jurisdiction of the district court to hear the Oneidas' complaint was predicated primarily upon 28 U.S.C. § 1331[4] and § 1362.[5] The Court of Appeals for the Second Circuit read into both of these statutes a requirement that, in order for federal question jurisdiction to be present, reliance on a federal right must appear on the face of a well-pleaded complaint. The Court of Appeals, therefore, affirmed dismissal for lack of jurisdiction on the grounds that the Oneidas' action is "basically in ejectment" and that a well-pleaded complaint in such an action only has to allege generally rightful ownership and wrongful dispossession, without regard to the specific source of the right or the specific nature of the wrong. *Oneida Indian Nation, etc., et al. v. County of Oneida, etc., et al.*, 464 F.2d 916 (2d Cir. 1972).

The Court of Appeals in reaching its jurisdictional decision did not focus upon whether the Congress intended, or judicial policy dictates, that the special jurisdictional grant to Indian tribes contained in 28 U.S.C. § 1362 be burdened by limitations, developed by the judiciary over the years, on the very general jurisdictional grant conferred on the federal courts by 28 U.S.C. § 1331. Rather, the Circuit Court virtually as-

---

[3] Amendments to the 1790 Act were made by the Act of March 1, 1793, 1 Stat. 330-31; and by the Act of June 30, 1834, 4 Stat. 730.

[4] Act of March 3, 1875, 18 Stat. 470, *as amended by* Act of June 25, 1948, 62 Stat. 930, and Act of July 25, 1958, 72 Stat. 415.

[5] Act of October 10, 1966, 80 Stat. 880.

sumed[6] that the well-pleaded complaint rule necessarily applies equally to both jurisdictional grants and focused solely upon whether the complaint, when tested by that rule, indicated reliance upon a federal right. Amici curiae submit, however, that whether it was ever appropriate for a court to resort to the well-pleaded complaint rule to deprive an Indian tribe of its day in federal court under 28 U.S.C. § 1331, Congress in enacting 28 U.S.C. § 1362 did not intend this special Indian jurisdictional grant, already limited in terms of the class which could benefit thereby, to be further limited by the "niceties of pleading."

B. Congress Intended by 28 U.S.C. § 1362 to Confer Special Federal Question Jurisdiction Upon the Federal District Courts to Adjudicate Civil Actions Brought by Indian Tribes Without Regard to Judicial Limitations on General Federal Question Jurisdiction (28 U.S.C. § 1331) Designed to Prevent the Federal Court Machinery from Being Overburdened by Suits Involving Essentially State Causes of Action.

The Act of October 10, 1966, 80 Stat. 880, 28 U.S.C. § 1362, provides that the federal district courts

> shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Nothing on the face of the statute suggests that Congress intended therein to preclude an Indian tribe's access to the federal courts to seek redress for wrongful dispossession of lands.

---

[6] The Circuit Court's sole and cursory discussion of any difference between § 1331 and § 1362 is contained in a footnote. 464 F.2d at 919, n.4.

The legislative history of 28 U.S.C. § 1362 indicates that this special federal question jurisdictional grant was to enable Indian tribes to sue on their own behalf in the federal courts where the United States Attorney declines to bring an action on their behalf.[7] The House Committee on the Judiciary specifically stated, as a justification for the passage of 28 U.S.C. § 1362, that:

> The enactment of this bill would provide for U.S. district court jurisdiction in those cases where the U.S. Attorney declines to bring an action and the tribe elects to bring the action. As is observed in the Department of the Interior report, the tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys. There is a large body of Federal law which states the relationship, obligations and duties which exists between the United States and the Indian tribes. The Federal forum is therefore appropriate for litigation involving such issues. (H.R. Rep. No. 2040, 89th Cong., 2d Sess. 3 [1966].)

---

[7] The Act of March 3, 1893, 27 Stat. 631, *as amended by* Act of June 25, 1948, 62 Stat. 909, 25 U.S.C. § 175, imposes an obligation upon the local United States Attorney to represent Indians in suits at law and in equity. The courts have held that this statute is not mandatory, notably in cases where bringing suit on behalf of Indians would involve a conflict with some other legitimate interest of the United States. *Rincon Band of Mission Indians v. Escondido Mutual Water Company*, 459 F.2d 1082 (9th Cir. 1972); *see, e.g., Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir. 1953). The proposition that the United States has the power to sue on behalf of the Oneidas is not open to question. *See United States v. Boylan*, 265 F. 165 (2d Cir. 1920).

Of course, if the United States Attorney had decided to bring this case on behalf of the Oneidas, the fact of the tribe's lack of possession of the disputed land would not be relevant to a determination of federal court jurisdiction.[8] While the Oneidas requested representation by the United States in this case, the request was denied on the grounds of a conflict of interest engendered by the Oneidas' suit against the United States in the Indian Claims Commission.

The legislative history of 28 U.S.C. § 1362 also indicates that the issue presented in this case is a federal issue which Congress intended would be cognizable by federal district courts. The Department of Interior in urging passage of § 1362 before the Senate and House Committees on the Judiciary stated that "with respect to litigation involving tribal lands that are or were held . . . by the tribe subject to a restriction against alienation imposed by the United States[, t]he issues involved are federal issues." S. Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966). The Department of Interior went on to state that "the tribes should not be required to conduct the litigation [involving such issues] in the State courts."[9] S. Rep. No. 1507, *supra,* at 3.

---

[8] *See* Act of June 25, 1948, 62 Stat. 933, 28 U.S.C. § 1345.

[9] This Court has stated that the construction of a bill expounded during the course of hearings thereon should be given

> at least that weight which the Court has in the past given to the contemporaneous interpretation of an administrative agency affected by a statute, especially where it appears that the agency has actively sponsored the particular provisions that it interprets. (*Shapiro v. United States,* 335 U.S. 1, 12, n.13 [1948].)

The Court, of course, has always shown great deference to the interpretation given to a statute by the officers charged with its administration. *Udall v. Tallman,* 380 U.S. 1, 16-18 (1965).

This case presents exactly the fact pattern which the legislative history demonstrates was intended by Congress to fall within the ambit of § 1362. The Oneidas are suing for lands taken from them allegedly in violation of the Indian Non-Intercourse Act, 25 U.S.C. § 177,[10] by which Congress imposed restrictions against alienation of Indian land throughout the country. Petitioners assert that, if the decision of the Court of Appeals for the Second Circuit is affirmed by this Court, the objective of Congress in enacting 28 U.S.C. § 1362 will be defeated since this case and, indeed, any other case brought by an Indian tribe concerning lands of which the tribe has been dispossessed, in violation of restrictions against alienation, will not be cognizable by the federal courts.

The sole basis, as previously stated, for the Circuit Court's holding that this case does not present, within the meaning of 28 U.S.C. § 1362, a federal question, is the nicety-of-pleading requirement reflected in the well-pleaded complaint rule. 464 F.2d at 920. The essence of the well-pleaded complaint rule is that, in order for jurisdiction to be present under 28 U.S.C. § 1331, the federal question must appear on the face of the complaint, and the complaint may not anticipate defenses or make allegations in support of the plaintiff's case which are not required by nice pleading rules. *See Taylor v. Anderson,* 234 U.S. 74 (1914); *Joy v. St. Louis,* 201 U.S. 332 (1906).

The well-pleaded complaint rule was fashioned by this Court in *Gold-Washing & Water Co. v. Keyes,* 96 U.S. 199 (1877), as a basis to limit the number of cases for which access to the federal courts would be

[10] Act of July 22, 1790, 1 Stat. 138, *as amended by* Act of March 1, 1793, 1 Stat. 330-31 and Act of June 30, 1834, 4 Stat. 730.

available under the general federal question jurisdiction conferred by 28 U.S.C. § 1331. The genesis of the rule lies in this Court's concern that, without such a limitation, the very broad nature of the jurisdictional grant reflected in § 1331 would result in the federal courts being flooded with claims that were essentially more local than federal. This was particularly true with respect to disputes concerning western lands, title to all of which originated with the federal government. *Shulthis v. McDougal,* 225 U.S. 561 (1912); *Gold-Washing & Water Co. v. Keyes,* 96 U.S. 199 (1877); *see also Shoshone Mining Co. v. Rutter,* 177 U.S. 505 (1900). Thus, "subtle distinctions, dependent on long-forgotten lore as to the forms of action" were utilized to reduce the number of cases which otherwise would be cognizable by the federal courts under 28 U.S.C. § 1331. C. WRIGHT, LAW OF FEDERAL COURTS 59 (1970).

The proposition is not open to question, however, that the grant of federal judicial power found in the Constitution is much broader than the construction which the federal courts have placed on 28 U.S.C. § 1331. *See Shoshone Mining Co. v. Rutter,* 177 U.S. 505, 506 (1900); *Louisville & Nashville Ry. Co. v. Mottley,* 211 U.S. 149 (1908); *National Mut. Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 613-15 (1948); *Zwickler v. Koota,* 389 U.S. 241, 246, n.8 (1967). The only requirement under the constitutional grant of federal question jurisdiction is that claims contain an "ingredient" of federal law. *See Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) 738 (1824). Thus, Congress has the constitutional power to confer on the federal courts jurisdiction over federal questions without regard to limitations such as those reflected in the well-pleaded complaint rule.

The Circuit Court, without analysis, merely assumed that the well-pleaded complaint rule should be applied to 28 U.S.C. § 1362 because language contained in both jurisdictional grants is identical with respect to conditioning jurisdiction on the existence of a controversy which "arises under the Constitution, laws, or treaties of the United States." The basis for applying the well-pleaded complaint rule to 28 U.S.C. § 1331, however, does not support application of the same rule to jurisdictional questions under 28 U.S.C. § 1362. The grant of jurisdiction in § 1362 is already limited by the very limited class, namely Indian tribes, which can invoke jurisdiction under this section. No danger exists that federal courts will be flooded under § 1362 with claims that are essentially more local than federal, and the courts, therefore, have no need to impose limitations such as those which may be properly applied to broad jurisdictional grants. *See* Mishkin, *The Federal "Question" in the District of Courts,* 53 COLUM L. REV. 157 (1953). Moreover, the legislative history of § 1362, as previously discussed, indicates that Indian land claims do not fall within that category of cases which the judiciary intended, by application of the well-pleaded complaint rule, to exclude from the jurisdiction of the federal district courts. S. Rep. No. 1507, *supra,* at 3.

A number of principles of statutory construction, beyond those already discussed, clearly support the proposition that the well-pleaded complaint limitation does not automatically apply, as the Circuit Court assumed, to § 1362 merely because the courts have applied the limitation to the same language in § 1331. This Court has recently held that similar phrases used in two different statutes that appear, at first glance, to have

similar purposes, should not necessarily be interpreted in the same manner. In reversing a decision of the United States Court of Appeals for the District of Columbia, that language in 42 U.S.C. § 1983 has the same meaning as that given by this Court to identical language in 42 U.S.C. § 1982 (*Hurd v. Hodge,* 334 U.S. 24, 31 [1948]), this Court stated:

> At first glance, it might seem logical simply to assume, as did the Court of Appeals, that identical words used in two related statutes were intended to have the same effect. Nevertheless, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law. . ." *Atlantic Cleaners & Dyers v. United States, supra,* 286 U.S., at 433, 76 L. Ed. 1204. (*District of Columbia v. Carter,* —— U.S. ——, 34 L.Ed. 2d 613, 618 [1973].)

The Circuit Court, in automatically assuming that the federal question language in 28 U.S.C. § 1362 should be interpreted in exactly the same fashion as the courts have interpreted the same language in § 1331, clearly violated this Court's standards as announced in *District of Columbia v. Carter.* The Circuit Court also ignored a recent admonition of this Court that while a statute should be interpreted

> with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking. (*United States v. Bass,* 404 U.S. 336, 344 [1971].)

The intent of Congress, evidenced by the legislative history of 28 U.S.C. § 1362, to include a case such as this within the scope of Indian federal question jurisdiction, is bolstered by the signal principle of Indian statutory construction that doubtful expressions in Acts of Congress affecting Indians are to be resolved in favor of the affected Indians. *See Squire v. Capoeman,* 351 U.S. 1, 9 (1956); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Minnesota v. Hitchcock,* 185 U.S. 373 (1902). The Court, in *Squire,* found that this principle outweighed another cardinal statutory construction principle that exemptions in federal tax laws must be clearly expressed; and, in *Hitchcock,* the Court held that even the long-standing policy of construing certain statutes in a manner that favors a state must give way, where a conflict exists, to this principle of Indian statutory construction.

The rule of *Squire, Alaska Pacific,* and *Hitchcock* is particularly significant in the context of 28 U.S.C. § 1362. A restrictive interpretation of § 1362 could deny to the Oneidas and many other federally-recognized tribes not only a federal forum to litigate claims concerning lands of which they have been dispossessed, but any forum to litigate such claims. As the Circuit Court recognized in a footnote to its opinion in this case (464 F.2d at 123, n.9), the Oneidas may not be able to bring their suit in the courts of the State of New York. Since the challenged transaction by which the Oneidas were dispossessed occurred in 1795, the New York courts may be barred from entertaining the Oneidas' suit by the Act of September 13, 1950, 64 Stat. 845, 25 U.S.C. §233, which states, in part:

> that nothing herein contained shall be construed as conferring jurisdiction on the courts of the State

of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

The probable lack of a judicial forum, moreover, is not a legislative oversight which will prejudice only the New York tribes. 28 U.S.C. § 1360 [11] and 25 U.S.C. § 1322 [12] impose on certain states, and permit other states to assume, civil jurisdiction over actions to which Indians are parties. Both statutes contain the same provision that the state jurisdiction therein authorized or imposed does not confer jurisdiction to adjudicate the ownership or right to possession of property held in trust by the United States for Indians or property subject to a restriction on alienation imposed by the United States, 28 U.S.C. § 1360(b); 25 U.S.C. § 1322 (b). These provisions, and the similar language in 25 U.S.C. § 233, moreover, are codifications of judicial decisions which reserve exclusively for federal courts the jurisdiction to hear claims involving the right to or possession of Indian lands. *United States v. Minnesota*, 305 U.S. 382 (1938); *Williams v. Lee*, 358 U.S. 217 (1959); *see also* Judge Friendly's opinion in this case at footnote 9, 464 F.2d at 923. Accordingly, absent diversity jurisdiction pursuant to 28 U.S.C. § 1332, the restrictive interpretation of 28 U.S.C. § 1362 rendered by the Court of Appeals in this case may close *all* judicial doors to Indian tribes asserting claims for lands of which they have been wrongfully dispossessed.

---

[11] Act of August 15, 1953, 67 Stat. 589, *as amended* by Act of August 24, 1954, 68 Stat. 795 and by Act of August 8, 1958, 72 Stat. 545.

[12] Indian Civil Rights Act of April 11, 1968, 82 Stat. 79.

III. CONCLUSION

Amici submit that the Court of Appeals for the Second Circuit erred by failing to scrutinize the purposes and understandings of Congress in enacting 28 U.S.C. § 1362 and by instead automatically applying to this already limited jurisdictional grant the well-pleaded complaint rule, a judicially wrought limitation on the broad federal question jurisdiction conferred by 28 U.S.C. § 1331. Furthermore, the Second Circuit disregarded this Court's repeated directive that statutes designed to benefit the Indians of this country should be construed to effectuate that purpose. Rather, the Circuit Court rendered a decision not constitutionally compelled and not supported by the applicable law or its legislative history, which may deprive Indian tribes of any forum to challenge the legality of a dispossession of their tribal land.

Amici urge this Court to reverse the decision below and to find that 28 U.S.C. § 1362 was intended by Congress to extend the original jurisdiction of the federal district courts to suits initiated by Indian tribes for land of which the tribes were dispossessed allegedly in violation of federal laws and treaties.

Respectfully submitted,

ARTHUR LAZARUS, JR.
FRANCIS J. O'TOOLE
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
Attorneys for Amici Curiae Association on American Indian Affairs, Inc., The Navajo Tribe, The Laguna Pueblo, The Salt River Pima-Maricopa Indian Community, and The Seneca Nation

L. GRAEME BELL, III
1712 N Street, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae Native American Rights Fund

Dated: July 19, 1973.